BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK MARTIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,028,706
CASE NEW HOLLAND	)	
Respondent	)	
AND	)	
	)	
CNH AMERICA LLC	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 3, 2008, Award of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was found to have suffered a 10 percent permanent functional impairment to the body as a whole followed by a permanent partial general (work) disability of 54 percent after the ALJ averaged claimant's task loss of 50 percent with a wage loss of 58 percent.

Claimant appeared by his attorney, James E. Martin of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Kevin Johnson of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. At the oral argument to the Board, the parties stipulated that the 10 percent whole body functional impairment found by the ALJ was the appropriate impairment for the purpose of this Award, and may be used by the Board in its determination of this matter. The Board heard oral argument on January 6, 2009.

ISSUES

What is the nature and extent of claimant's disability? Respondent argues that claimant should be limited to his functional impairment of 10 percent to the whole body as claimant was returned to work without restrictions by his treating physician, board certified orthopedic surgeon David K. Ebelke, M.D. In the alternative, respondent argues that

claimant's work disability should be based on a task loss of 7 percent as Dr. Ebelke testified that claimant only lost one of fourteen tasks. This would result in a work disability of 32.5 percent. Claimant argues that the Award of the ALJ should be affirmed, or increased to include a task loss of 64 percent based on the opinion of board certified orthopedic surgeon Edward J. Prostic, M.D.

Respondent acknowledged at oral argument to the Board that, though its application to the Board raised all issues raised by the respondent and insurance company before the ALJ, the only issue in dispute to the Board was that of the nature and extent of claimant's disability from the injuries suffered on March 1, 2006.

FINDINGS OF FACT

Claimant began working for respondent on October 31, 1991, in its warehouse distribution center. Respondent's business was a distribution center for farm and construction equipment. In March 2006, claimant was working as a receiving clerk, unloading trucks, both with the use of a forklift and manually. This required that claimant occasionally lift up to 100 pounds. On March 1, 2006, claimant was injured when he ran over a dock plate which was not flush with the floor. Claimant received a significant jolt to his back and after the incident, he hurt "just all over."[1] The incident was witnessed by claimant's supervisor James Farley who, claimant stated, said "If it hurts, don't run over it."[2] Attempts by claimant and respondent's maintenance personnel to repair the dock plate were unsuccessful, and an outside business was called in to perform the repairs.

Claimant continued to work, but his condition did not improve. He went to Joel R. Lane, M.D., an orthopedic surgeon, and an MRI was performed on April 7, 2006. Claimant presented the results of the MRI to respondent, and he was sent to Wyandotte Occupational Health Services. He was referred to Joseph F. Galate, M.D., where he underwent a series of three epidural injections. The second injection provided only temporary relief, with the first and third providing no relief.

Claimant ultimately came under the care of David K. Ebelke, M.D., who first examined claimant on August 28, 2006. On November 16, 2006, Dr. Ebelke performed a left L5-S1 microdiscectomy on claimant. Claimant progressed well from the surgery, and approximately three months after the surgery, claimant was released to return to work. When asked about restrictions, Dr. Ebelke stated that he sometimes gave restrictions and sometimes not. It depended on the patient. Here, claimant had requested a no-restriction release to facilitate his return to his old job. However, Dr. Ebelke also stated that common

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[1] P.H. Trans. at 8.

[2] P.H. Trans. at 8-9.

sense was appropriate and claimant was to participate in no sports the first few months and "limit lifting to 15, 20, 30 pounds".[3] He provided no permanent restrictions to claimant but did recommend that claimant avoid extremes of lifting. Dr. Ebelke specifically noted lifting and carrying 100 pounds should be avoided. Claimant was rated at 10 percent to the whole body pursuant to the fourth edition of the AMA *Guides*.[4] Dr. Ebelke was asked to review the task list prepared by vocational expert Michael Dreiling. In reviewing the list, Dr. Ebelke found claimant unable to perform one of the fourteen tasks on the list, for a task loss of 7 percent.

After claimant was released by Dr. Ebelke, he returned to work for respondent picking parts. This required that he lift 20 to 30 pounds maximum. This job only lasted approximately two months at which time respondent's plant shut down and the operation moved to respondent's Cameron, Missouri warehouse. The employees in the Kansas City, Kansas warehouse, including claimant, were not offered jobs at the Cameron facility. Claimant never returned to the receiving clerk job with respondent. Since his layoff, claimant has continually sought employment. He has found several temporary jobs through temporary agencies. At the time of the regular hearing, claimant was working for the United Methodist Church in Leawood, Kansas. Claimant would set up classrooms, tables and chairs, lifting occasionally over 50 pounds. Claimant was paid $10.00 per hour working 40 hours per week. Claimant acknowledged that if respondent had not closed its facility in Kansas, he would still be working there. Claimant's average weekly wage at respondent, as stipulated to by the parties, was $947.98. Claimant's job with the church thus calculates to a wage loss of 58 percent.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an evaluation, with the first examination on June 14, 2006. Claimant returned to Dr. Prostic on November 6, 2007. Claimant was found to have suffered a 17 percent functional impairment to the whole body with the rating being a compromise between the DRE and range of motion methods from the fourth edition of the AMA *Guides*.[5] Dr. Prostic acknowledged that the DRE alone would result in a 10 percent whole body impairment. After reviewing the task list of Mr. Dreiling, Dr. Prostic determined that claimant had lost the ability to perform 9 of 14 tasks on the list. However, as noted by the ALJ, task numbers 8 and 9 were part of the job claimant performed after returning to respondent when he was released by Dr. Ebelke. Claimant's attorney argued to the Board that the tasks numbered 8 and 9 should not be included as they represented tasks performed by claimant only after being released by Dr. Ebelke. However, the task analysis of Mr. Dreiling indicated claimant had been performing task number 8, "place and stock

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[3] Ebelke Depo. at 13.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[5] AMA *Guides* (4th ed.).

parts into inventory bins" for six months and task number 9, "pick orders" for 3 to 4 years. Claimant's request to omit the tasks numbered 8 and 9 is denied. The Board agrees with the ALJ's determination that claimant also performed the tasks numbered 8 and 9 both before and after being returned to work by Dr. Ebelke. Therefore, the exclusion of those tasks by Dr. Prostic was not proper.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[6]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[7]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[8]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[9]

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[6] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[7] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] K.S.A. 2005 Supp. 44-501(a).

[9] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[10]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[11] and *Copeland.*[12] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[13]

In considering the task loss opinions of Dr. Ebelke and Dr. Prostic, the Board finds the opinion of Dr. Prostic to be the more persuasive. Dr. Ebelke's refusal to provide restrictions after back surgery casts doubt on his opinion. The Board finds it more likely that claimant would have some restrictions following back surgery. However, the original opinion of Dr. Prostic included the exclusion of tasks 8 and 9, which the Board has rejected. This results in a final task loss of 50 percent.

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[10] K.S.A. 44-510e.

[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[13] *Id.* at 320.

With regard to the wage loss analysis required under K.S.A. 44-510e, respondent alleges that claimant should be denied any work disability due to claimant's having been returned to work at what respondent describes as an unaccommodated job at a comparable wage. Respondent cites *Watkins*[14] in support of its position. In *Watkins*, the claimant was returned to work, post-injury, and performed the same work for the same wage. The Court, in reversing a work disability award by the Board, held that,

> Where a previously injured employee returns to work in an unaccommodated job and earns wages comparable to those earned before his or her injury, the presumption of no work disability applies and will not be rebutted absent evidence of a change in the employee's physical condition."[15]

Watkins was distinguished by the Kansas Court of Appeals in *Roskilly.*[16] In *Roskilly*, the claimant was employed as an assembler for Boeing. Beginning in 1996, he worked under lifting restrictions to a maximum of 50 pounds with frequent lifting limited to 35 pounds. In October 2001, the claimant suffered an injury to his low back while lifting a part weighing 50 to 75 pounds. While undergoing treatment, he continued to work as an assembler without additional restrictions beyond those provided from the 1996 injury. While still receiving treatment for the recent 2001 injury, Roskilly was laid off due to a general reduction of Boeing's labor force. The Board awarded Roskilly a 59.5 percent permanent partial disability to the body as a whole. The Court of Appeals, in considering the policies of *Watkins*, determined that Roskilly had returned to work without accommodation, but the presumption of no work disability was successfully rebutted due to the fact Roskilly had suffered a change in his physical condition as a result of the injury. Dr. Pedro Murati offered an opinion that Roskilly's physical restrictions precluded him from performing all of his regular duties. In *Roskilly*, the Court determined that claimant had returned to regular employment for only a very limited time before the layoff, his medical treatment continued with definitive evaluations after the termination, those medical evaluations assessed changes in Roskilly's physical condition as a direct result of the injury sustained in 2001 and the evaluations found most credible by the Board supported its determination of work disability. The Court of Appeals went on to analyze the Board's interpretation of the 1992 version of K.S.A. 44-510e with what was the more current version at that time. The Court, in *Roskilly*, in reviewing the Board's interpretation of K.S.A. 44-510e(a) and contrasting it with the prior law in *Watkins*, quoted the following analysis from the Board's decision:

> It is no longer an ability test, at least not in the sense of being applicable to the prospective job market, that is from the date of accident forward. Putting aside

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[14] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

[15] *Id.*, 23 Kan. App. 2d, 837, Syl.

[16] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005).

> for the moment the question of good faith, to the extent ability is still a factor under the current statute, it is retrospective, instead of prospective. That is because the extent to which the injured worker's ability to work has been impacted is measured by the loss of actual job tasks the worker performed in any substantial gainful employment during the fifteen-year period preceding the accident. The loss is no longer measured by the total open labor market that exists after the accident. The rationale for this change was to get away from hypothetical jobs which the worker may or may not have had the education, training or experience to perform, and to, instead, utilize jobs the worker actually performed. The effect of this change is to render meaningless the distinction between accommodated and unaccommodated jobs, except to the extent that the concepts impact the task loss analysis. Accordingly, it is only in the situation where the injured worker had worked exclusively in the same job for the entire fifteen years preceding the accident that the successful return to that same unaccommodated job would establish a prima facie case for no work disability.
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> In short, *Watkins* involved a different definition of work disability. The former version of K.S.A. 44-510e involved an ability test both as to jobs and wages, and *Watkins* is premised on that ability test. This distinction has been recognized by the Court of Appeals.
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> Currently, ability or capacity to earn wages only becomes a factor when a finding is made that a good faith effort to find appropriate employment has not been made. *Copeland v. Johnson Group, Inc.,* 26 Kan. App. 2d 803, 804, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000). Once a finding has been made that the claimant has established a good faith effort, the difference in pre-and post-injury wages can be based on the actual wages made. *Copeland,* 26 Kan. App. 2d at 804.[17]

The Court found the Board's conclusion that the then current version of K.S.A. 44-510e(a) does not preclude an award of work disability after a claimant's loss of employment, even though due to reasons other than his or her injury. The Court in *Roskilly* went on to state:

> In addition, the 1993 legislative amendment to K.S.A. 44-510e(a) removed from the statute the language "[t]here shall be a presumption that the employee has no work disability *if* " the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury, and replaced the same with the language "[a]n employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment *as long as* the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) L.1993, ch. 286, sec. 34. The language of the statute as amended is plain and unambiguous, leaving no room for judicial construction. See *Williamson v. City of Hays,* 275 Kan. 300, 305, 64 P.3d 364 (2003). We hold that on its face K.S.A. 44-510e(a) no longer

[17] *Id*. at 200.

> may be read to make a distinction between accommodated employment and unaccommodated employment when determining an injured worker's right to recover work disability benefits.[18]

The Board finds that respondent's reliance on *Watkins* is misplaced and claimant is not precluded from a work disability in this instance, even though he returned to work for respondent at a comparable wage. It is clear in this instance that claimant has experienced a change in his physical condition resulting in entitlement to a permanent partial disability award under K.S.A. 44-510e(a).

In averaging the claimant's wage loss of 58 percent with the task loss of 50 percent the Board finds claimant has suffered a permanent partial work disability of 54 percent. The Award of the ALJ is, therefore, affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 3, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[18] *Id*. at 201.

Dated this ____ day of January, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Kevin Johnson, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge